FILE COPY

JUN 14 1972

MICHAEL ROD

In the

Supreme Court of the United States

October Term, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY AND
CAMERON CRUDE OIL CORPORATION,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY AND
DIAMOND SHAMROCK CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

DIAMOND SHAMROCK CORPORATION'S BRIEF IN OPPOSITION

W. E. NOTESTINE,
P. O. Box 631,
Amarillo, Texas 79105,
H. A. BERRY,
A. W. SORELLE III,
*W. M. SUTTON,
P. O. Box 9158,
Amarillo, Texas 79105,
Attorneys for Diamond Shamrock Corporation.

Of Counsel:
UNDERWOOD, WILSON, SUTTON, HEARE & BERRY
P. O. Box 9158
Amarillo, Texas 79105

* Counsel upon whom service is to be made.

TABLE OF CONTENTS

	Page
Opinion Below	1
Preliminary Statement	2
Questions Presented (As Restated by this Respondent)	3
Statement of the Case	4
Argument	11
I.	
Any So-Called Procedural Error, Committed in the Timing of the Directed Verdicts Was Waived by Petitioners, Who Were Not Prejudiced by Such Timing.	11
II.	
No Conflict Exists Between The Decision Herein and Other Circuit Courts Concerning The Need to Prove "Dangerous Probability of Success" in Attempt to Monopolize Cases Where, as Here, The Court Found No Evidence of Illegal Intent To Monopolize.	17
III.	
The Decisions Below Did Not Raise An Issue Regarding Intercorporate Conspiracies.	20
Conclusion	22
Appendix (Opinion of Court of Appeals)	A-1
Panotex Pipe Line Co., et al., v. Phillips Petroleum Co. and Diamond Shamrock Corporation, F. 2d (5th Cir. 1972)	1a-24a

Page

Cases

American Tobacco Company v. United States (1946), 328 U.S. 781 17
Baltimore & Ohio Railroad Co. v. Groeger (1925), 266 U.S. 521 14
Board of County Commissioners of the County of Marion, The v. Clark (1877), 94 U.S. 278 14
Brady v. Southern Railway Company (1943), 320 U.S. 476 ..... 14, 16
County of Macon v. Shores (1877), 97 U.S. 276 14
Edwards v. Kearzey (1878), 96 U.S. 572 14
General Talking Pictures Corporation v. Western Electric Company (1938), 304 U.S. 175 2
Houston Oil Company v. Goodrich (1918), 245 U.S. 440 2
Lessig v. Tidewater Oil Company (9th Cir. 1964), 327 F. 2d 459, cert. den. 377 U.S. 993 ..... 17, 19
Merchants National Bank of Boston v. The State National Bank of Boston (1871), 77 U.S. 604 ..... 13, 14
Oscanyan v. Winchester Repeating Arms Company (1881), 103 U.S. 261 14
Pennsylvania R.R. Co. v. Chamberlain (1933), 288 U.S. 333 15
Southern Power Company v. North Carolina Public Service Company (1924), 263 U.S. 508 2
Southern Railway Company v. Walters (1931), 284 U.S. 190 15
Swift & Co. v. United States (1905), 196 U.S. 375 17
Times-Picayune Publishing Company v. United States (1953), 345 U.S. 594 17
United States v. Consolidated Launderies Corporation (2nd Cir. 1961), 291 F. 2d 563 19
United States of America v. Johnston (1925), 268 U.S. 220 2

Federal Rules of Civil Procedure

Rule 50(a) ..... passim

Miscellaneous

C. Wright, Law of Federal Courts (2d ed. 1970) 15

In the

Supreme Court of the United States

October Term, 1971

No. 71-1504

PANOTEX PIPE LINE COMPANY AND
CAMERON CRUDE OIL CORPORATION,

Petitioners,

v.

PHILLIPS PETROLEUM COMPANY AND
DIAMOND SHAMROCK CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

DIAMOND SHAMROCK CORPORATION'S BRIEF IN OPPOSITION

This brief is submitted by Diamond Shamrock Corporation, formerly The Shamrock Oil and Gas Corporation, one of the separate unrelated corporate defendants, respondents herein, for convenience hereinafter called "Shamrock".

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is set forth in the Appendix (App.) to this Brief (1a to 24a). References to the attached opinion will be designated (Opn. App. .....).

PRELIMINARY STATEMENT

Petitioners seek to support their petition by restating and rearguing the evidence and inferences to be drawn therefrom and by injecting into the case factual claims which were not found to exist or which were found contrary to petitioners' assertions. Thus, a review of the evidence by this Court is necessary if it is to consider petitioners' questions. It has been the long standing policy of this Court that certiorari will not be granted to review evidence and inferences drawn therefrom and to discuss specific facts. [1]

This case does not present a situation requiring this Court to grant or one that would justify this Court in granting certiorari to review and examine the evidence and findings of fact as petitioners would have the Court do. This is true because the facts involved are of a peculiar and limited nature. Thus decisions of the lower courts are of limited application restricted to the same or similar fact situations and are not of a recurring nature or of public interest.

The courts below held that the verdicts were respectively directed and affirmed following a review of the evidence in a light most favorable to petitioners, and after giving them the benefit of all reasonable inferences that could be drawn from the established facts from which both courts concurred in finding and concluding that reasonable men could not differ as to the result. After such review, the Court of Appeals stated multiple legal grounds for disposing of petitioners' claimed error. Petitioners' questions, however, disregard the various independent legal

[1] "We do not grant a certiorari to review evidence and discuss specific facts." United States of America v. Johnston (1925), 268 U.S. 220, 227. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." General Talking Pictures Corporation v. Western Electric Company (1938), 304 U.S. 175, 178. To like effect are, Southern Power Company v. North Carolina Public Service Company (1924), 263 U.S. 508, 509; Houston Oil Company v. Goodrich (1918), 245 U.S. 440, 441.

grounds upon which the Court of Appeals predicated its ultimate decision. Petitioners have merely presented three abstract questions. To reach any of the questions for decision, this Honorable Court would be forced to review the evidence and disregard the findings of the Court of Appeals which support the ultimate decision of both lower courts.

Petitioners' questions must be restated in the context of the case involved, and when so restated are as follows:

QUESTIONS PRESENTED
(As Restated by this Respondent)

I.

Should this Court grant certiorari to review, and review a question of whether the Court of Appeals erred in affirming a directed verdict granted for defendant Shamrock during the presentation of defendant Phillips' case in chief, where both lower courts found that there was no evidence to raise a material fact issue for the jury, considering all of the evidence and viewing it in the light most favorable to plaintiffs and giving plaintiffs the benefit of all inferences reasonably drawn from the established facts, and where plaintiffs failed to object to the timing of the verdict, and failed to demonstrate any prejudice flowing from the timing of the verdict.

II

Whether the Court of Appeals' reference to lack of proof of "dangerous probability of success" creates a material conflict of holding with other cases such as to require or justify certiorari and review, when the court below also found no illegal intent to monopolize, no predatory conduct and no act that was illegal per se on the part of the defendants.

III.

Whether an agreement between a parent corporation and its subsidiary corporation to carry out the normal business pur-

poses of the corporations is evidence of an illegal conspiracy where there was no evidence that such conduct was with intent to monopolize or was independently illegal or constituted a "per se" violation of the antitrust law.

STATEMENT OF THE CASE

Except for the opening paragraph stating how this suit originated, petitioners' Statement of the Case is an attempt to have this Court review evidentiary questions either found against petitioners or not presented by the record. Shamrock submits the following Statement of the Case based upon and primarily referenced to the findings and opinion of the Court of Appeals, which findings petitioners ignore rather than challenge.

The trial court directed verdicts for the defendants Shamrock (A. 1154, 1189-90) and Phillips (A. 1195-97) after the plaintiffs had completed their testimony and while Phillips was putting on its case in chief, but before Shamrock started its case in chief. The trial court found (A. 1154 and 1215), after viewing all of the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences that might be reasonably drawn from established facts, that reasonable men could not differ on the result, and accordingly separate verdicts were directed for both Shamrock and Phillips.

The Court of Appeals concluded, after applying the same test, that the evidence showed nothing more than legitimate competition between the parties (Opn. App. 22a, 23a), and that after considering all the evidence and every contention made by plaintiffs, that it could

> "[F]ind no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively." (Opn. App. 23a).

The Clerk of the Court of Appeals has forwarded to this Court at Shamrock's request Vol. I APPELLEES' SUPPLEMENTAL

APPENDIX filed in the Court of Appeals. Such volume contains colored reproductions, on a reduced scale, of Exhibits, received in evidence without objection (A. 902, 916-917) and identified as PPCo. Ex. 1, PPCo. Ex. 2 and the First through Eighth overlays to PPCo. Ex. 2. PPCo. Ex. 1 is the same or similar map, except in color, as was attached to the opinion by the Court of Appeals (Opn. App. 24a) and shows the Oil Gathering Systems as of September 8, 1968. PPCo. Ex. 2 reflects the chronological extensions of the Shamrock and Phillips lines.

The reproductions of these unchallenged and undisputed maps are helpful in understanding the fact situation, as it undeniably existed, and why the Court of Appeals found:

As to Shamrock,

> "There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex." (Opn. App. 20a)
>
> "There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action." (Ops. App. 21a); and

as to Phillips,

> "The action of Phillips in extending into Area II did not arise above a protective motive. * * * There was no proof of predatory conduct, or of conduct which was illegal per se." (Opn. App. 19a).

The map marked PPCo. Ex. 2 shows the locations of the Shamrock refinery in Moore County and the Phillips refinery in Hutchinson County, each being in the Panhandle Oil Field where both Shamrock and Phillips initially obtained the supply of oil needed to meet the requirements of their respective refineries. As of 1954, the crude oil reserves in the Panhandle Oil Field were becoming inadequate to meet the needs of these refineries (Opn. App. 12a).

New fields were being developed to the north and east in Hansford and Ochiltree Counties, Texas, and by 1957 Shamrock had extended its pipeline north into fields located in Hansford and Ochiltree Counties to supply oil for its refinery (Opn. App. 12a and 13a). See also PPCo. Ex. 2, First Overlay.

By 1961 Phillips had extended its pipeline northward through the southeast corner of Hansford County to connect one field and through Ochiltree County to connect several fields in Texas and Beaver Counties, Oklahoma (Cameron area). Phillips' line crossed Shamrock's line in Ochiltree County (Opn. App. 13a). See also PPCo. Ex. 2, Second Overlay and Third Overlay.

By 1963 Shamrock had extended its pipeline eastward into the new area in Lipscomb County to connect the Frass and Follett fields. "This was pre-Panottx." (Opn. App. 13a and 14a). See also PPCo. Ex. 2, Fourth overlay.

Panotex Pipe Line Company was not incorporated until July of 1964 (Opn. App. 14a). Construction of its pipeline extending northwesterly from Elk City, Oklahoma, across the corner of Hemphill and through Lipscomb Counties, Texas, and into Beaver and Texas Counties, Oklahoma (see map Opn. App. 24a), was not commenced until October, 1964, and it did not become operative until January, 1965 (Opn. App. 14a). See also PPCo. Ex. 1 and PPCo. Ex. 2, Fifth and Sixth overlays.

The Shamrock pipeline reached the Lipscomb County field in 1963, and extended a short distance to the Logan and Bechtold fields in August, 1964. Prior to its extension into Logan and the entry of Panotex, Shamrock had been purchasing oil from the Logan area from a trucker who served the area. (Opn. App. 16a). See also PPCo. Ex. 2, Fourth and Fifth overlays.

The Panotex line was extended into the Feldman, West Higgins, Kelln and Mathers field in southern Lipscomb and northern Hemphill Counties, Texas, but as stated by the Court of Ap-

peals: "It is noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins." (Opn. App. 15a). See also PPCo. Ex. 2, Sixth and Seventh Overlays.

Plaintiffs' Exhibit 118, forwarded to this Court at the request of petitioners and reproduced as Addendum 1 to the Petition, designates three areas called Areas I, II and III. Petitioners tried the case on the theory that such three areas were the relevant markets. The Court of Appeals considered the case on that basis without determining the correctness of the delineation (Opn. App. 15a). As shown, Area III covers Lipscomb and the northern part of Hemphill Counties, Texas. As found by the Court of Appeals, it was only in this Area III where Shamrock and Panotex competed (Opn. App. 21a). The fact that Shamrock had extended its line into Lipscomb County more than a year before Panotex's incorporation and entry into Lipscomb County cannot be questioned (Opn. App. 13a, 14a, 21a). See also PPCo. Ex. 2, Fourth overlay.

Prior to the construction of the Panotex pipeline, Cameron had, beginning in 1963, solicited and obtained commitments from 80% of the producers (Opn. App. 20a). Cameron's contracts with the producers held them to their commitments, provided Cameron met the price of others (Opn. App. 21a).

Immediately following the completion of the Panotex line, the plaintiffs had obtained all of the oil that was committed to them, including all of the oil from the Logan area, except from one producer who was not committed to Cameron (Opn. App. 17a and A. 230-231). In the ensuing years, Panotex obtained all new production in Area II, where Shamrock did not compete, and in the Logan area, where Shamrock had sought to compete and where it, except for the one producer who was not committed to Cameron, was unsuccessful. (Opn. App. 17a).

The Court of Appeals found there was no evidence that

Shamrock conspired with its subsidiary pipeline corporation (The Shamrock Pipe Line Corporation) to restrain trade or to monopolize. The competing lines were simply built by such subsidiary of Shamrock either *prior* to the entry of Panotex Pipe Line or *after* the entry of Panotex Pipe Line into Area III, where Shamrock and Panotex competed (Opn. App. 20a).

That Shamrock was in Area III prior to the entry of Panotex and was seeking oil for its refinery was apparent from undisputed evidence and was so found by the Court of Appeals (Opn. App. 13a, 14a, 21a). See also PPCo. Ex. 2, Fourth overlay. This respondent submits it is equally indisputable, as found by the Court of Appeals, that Shamrock competed with Panotex for oil without predatory action and that it engaged in no conduct that could be described as illegal per se under the Sherman Antitrust Act, and that the proof is clear that there was no dangerous probability of a monopoly (Opn. App. 21a).

Assuming, as claimed by petitioners, the areas designated I, II and III on Plaintiffs' Exhibit 118 are the relevant markets, it is obvious from such exhibit of plaintiffs, and as found by the Court of Appeals, that neither Shamrock nor Panotex competed in or entered Area I (Opn. App. 15a). Area II is in south Beaver County, Oklahoma, and consists mainly of the Balko, Elmwood and Como fields in that area. Phillips extended its pipeline east through Balko and Elmwood to the Como field in December, 1964. Panotex extended its line westward through these fields in January of 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do (Opn. App. 15a).

Area II, consisting of the three fields, Balko, Elmwood and Como, was served by both Phillips and Panotex. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Cameron

began solicitations in Area II in 1963 where there was no previous pipeline service. Phillips also solicited in the Logan field in Area III, but had little success in obtaining commitments (Opn. App. 17a).

Immediately upon the completion of the Panotex line, the plaintiffs were purchasing 100% of the Balko production, most of the Elmwood production, 50% of the Como production (Phillips had some production) and as previously noted all of the Logan production except for one producer who was uncommitted to Cameron and which connection Shamrock obtained (Opn. App. 17a).

The plaintiffs claimed that the extension of the Phillips pipeline was uneconomical, but the Court of Appeals found (Opn. App. 18a) that there was no proof that the extension was unprofitable and hence no inference of predatory conduct could be drawn therefrom. The Court of Appeals concluded there was no evidence of a conspiracy between Phillips and its subsidiary and likewise found that there was no evidence of an attempt to monopolize on the part of Phillips or a dangerous probability of success (Opn. App. 18a).

As to Shamrock and its subsidiary, the Court of Appeals found:

> "The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly." (Opn. App. 21a).

As to the alleged conspiracy between Phillips and Shamrock, the Court of Appeals found that Phillips and Shamrock had been

competing in the general area for more than 40 years and that they competed for oil in the Logan field (Opn. App. 21a, 22a). Phillips had been seeking commitments in the Logan field without success. Panotex got every producer in such field except the one acquired by Shamrock. Phillips' interest was so great that it staked a right-of-way into the Logan field, but abandoned the prospect for lack of business. Phillips had its own production in the Como field and other additional supplies. These facts gave good reasons for Phillips to stop at the Como field and for Shamrock to stop at Logan, particularly when Panotex had commitments from all of the producers in the Logan field except one and had commitments from all of the producers in the Como field except those held by Phillips. No inference of a division of markets between Shamrock and Phillips can be drawn from these facts (Opn. App. 22a).

The Court of Appeals correctly analyzed the claim of petitioners as it was presented in the trial court and in the Court of Appeals (and as it is renewed in the Petition filed herein) as follows (Opn. App. 23a):

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoloy does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. Northern Pacific Railway Company v. United States, 1958, 356 U.S. 1, 4-5, 78 S. Ct. 514, 2 L. Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively."

The Court concluded, based on the record before it:

> "The record is one of allowable competition — nothing more." (On. App. 23a)

Certiorari should not be granted to review evidence and discuss the facts as petitioners would have this Honorable Court do.

ARGUMENT

I.

ANY SO-CALLED PROCEDURAL ERROR, COMMITTED IN THE TIMING OF THE DIRECTED VERDICTS WAS WAIVED BY PETITIONERS, WHO WERE NOT PREJUDICED BY SUCH TIMING.

The Court of Appeals found it unnecessary to reach the question of whether Rule 50(a)[2] prohibits the granting of a directed verdict during the presentation of defendant's case. Rather, the Court held petitioners had failed to demonstrate any harm flowing from the timing of the verdict and the facts clearly show a waiver by petitioners of any such claimed error. As stated by the Court of Appeals:

> "At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing." (Opn. App. 4a).

Petitioners do not here challenge such finding and determination

---

[2] FEDERAL RULES OF CIVIL PROCEDURE
"Rule 50.
"MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT
"(a) Motion for Directed Verdict: When Made; Effect. "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

by the Court of Appeals. This Honorable Court should not be called on to look further.

Petitioners had ample opportunity to object in the trial court to the timing of the directed verdicts at a time when the trial court could have prevented what the petitioners now claim to be a procedural error. Prior to the granting of the directed verdicts, but after what the Court intended doing became known, there was a long colloquy between the court and counsel, out of the presence of the jury (Opn. App. 3a, A. 1144-1197). No claim of prejudice was made by petitioners because of such timing and no offer was made of any proof that would show how petitioners would be prejudiced by the timing of the directed verdicts. Because of such failures, petitioners clearly waived any so-called procedural defect and this Court should not be called upon to exercise its discretion to review such claimed procedural error, particularly where the petitioners, as found by the Court of Appeals, were not prejudiced thereby.

The Court of Appeals pointed out (Opn. App. 4a) that at a hearing on the form of the final judgment a month after the verdicts were instructed, plaintiffs took the position for the first time that they were prejudiced by the timing of the granting of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The Court of Appeals found "The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing." (Opn. App. 4a).

Such claim of reserved right to reexamine witnesses was not urged in the Court of Appeals (Opn. App. 4a and 5a), nor is it claimed here by petitioners. On the contrary, the petitioners claimed in the Court of Appeals and assert herein, as described and discussed in the following paragraph, the right to rebut certain evidence there described.

In the Court of Appeals petitioners claimed, as they now do

on page 4 of their Petition, that the trial court had granted them the right to rebut certain evidence put in by Phillips and described in the Court Opinion as set out in the footnote below.[3] With respect thereto, the Court of Appeals found:

> "We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events." (Opn. App. 5a).

As in the Court of Appeals, petitioners completely fail in their Petition to show the need to rebut the evidence referred to, how it could be rebutted or how it was prejudicial to petitioners.

Petitioners insisted in the Court of Appeals that Rule 50(a) prohibits the granting of a motion for instructed verdict during the presentation of the defendants' case. The Court of Appeals points out that the rule itself contains no such prohibition, and that the Court of Appeals could find no case suggesting such a prohibition (Opn. App. 6a). Petitioners cite us to none.

As pointed out by the Court of Appeals (Opn. App. 6a), the question of directing a verdict for a defendant during defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. With respect thereto, the Court of Appeals concluded:

> "Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed." (Opn. App. 6a).

In support of the trial court's authority to instruct a verdict, the court cited *Merchants National Bank of Boston v. The State National Bank of Boston* (1871), 77 U.S. 604, wherein the

[3] "They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex." (Opn. App. 5a).

court stated it was the practice to give the instruction for a directed verdict if it were clear that the plaintiff could not recover and that it would be idle to proceed further when such must be the inevitable result (Opn. App. 6a). Many other cases by this Court, some citing *Merchants National Bank of Boston v. The State National Bank of Boston*, are to the same effect.[4]

The fact that petitioners received due process and a fair trial within the framework and teachings of this Court in the cases just cited is demonstrated by the trial court's conclusion, affirmed and reiterated by the Court of Appeals, that after reviewing the evidence in the light most favorable to plaintiffs and indulging in plaintiffs' favor all inferences reasonably drawn from established facts, directed verdicts should be given for the defendants since reasonable men could not differ as to the result.

The careful analysis of the record by the Court of Appeals, evidenced by its opinion, its complete findings of fact and the inevitable conclusions drawn by it from such facts, further demonstrate that the plaintiffs received due process and a fair trial and demonstrate that the facts present nothing more than a case of legitimate competition rather than proscribed activities resulting in illegal competition, or conduct that was illegal per se.

Petitioners seemingly draw the conclusion that the Court of Appeals reached its decision by ignoring plaintiffs' evidence and relying on the evidence of the defendants. The opinion below makes it clear that such assertion by petitioners is ill founded.

[4] The Board of County Commissioners of the County of Marion v. Clark (1877), 94 U.S. 278; Edwards v. Kearzey (1878), 96 U.S. 572; County of Macon v. Shores (1877), 97 U.S. 276; Oscanyan v. Winchester Repeating Arms Company (1881), 103 U.S. 261; Baltimore & Ohio Railroad Co. v. Groeger (1925), 266 U.S. 521, 524, and the multitude of Supreme Court cases there cited to the effect that it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different ruling; Brady v. Southern Railway Company (1943), 320 U.S. 476, 479-480, and the cases there cited.

From the opinion of the Court of Appeals it appears that in the trial court there was no actual controversy on any material fact. There was either no evidence to support a particular claim of plaintiffs or the established indisputable evidence, supplied by both plaintiffs and defendants, was so clear and uncontrovertible that support for plaintiffs' claims could not be found either in such evidence or in any reasonable inference to be drawn therefrom.

By citing Professor Wright's LAW OF FEDERAL COURTS, one of the Hornbook Series of law school publications of West Publishing Company, petitioners seek to present a conflict between decisions as to whether all of the evidence presented to the time of the directed verdict or only the evidence favorable to the non moving party, should be considered in determining whether a directed verdict should be granted. Professor Wright acknowledges that the rule that all the evidence should be considered was established by this Court in *Pennsylvania R.R.Co. v. Chamberlain* (1933), 288 U.S. 333, and *Southern Railway Company v. Walters* (1931), 284 U.S. 190, but speculates that this Court has "apparently adopted a different rule, though without expressly rejecting the older cases."[5] The only decisions cited by Professor Wright as supporting a different rule are, however, *FELA* and *Jones Act* cases and any rules stated therein should be limited to *FELA* and *Jones Act* cases because of their special statutory nature.

This respondent submits that if it is ever necessary to resolve any so-called "conflict", such issue is not presented in this case because petitioners are not entitled to recover under their philosophy of this case or under their view of the applicable law. The Court of Appeals, said in such regard:

---

[5] C. Wright, Law of Federal Courts 426 (2d ed. 1970).

> "It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition." (Opn. App. 23a).

This Court, in *Brady v. Southern Railway Company* (1943) 320 U.S. 476, adopted the "reasonable man" test in passing on the sufficiency of the evidence to support a directed verdict as follows:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Both the trial court and the Court of Appeals applied such test in this case and after viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might be reasonably drawn from established facts concluded there was no antitrust violations and the record was "one of allowable competition — nothing more."

This case because of its peculiar fact situation does not present questions of great public interest requiring this Court to grant certiorari to review the evidence and inferences drawn therefrom and to discuss specific facts as petitioners seek by their Petition.

II.

NO CONFLICT EXISTS BETWEEN THE DECISION HEREIN AND OTHER CIRCUIT COURTS CONCERNING THE NEED TO PROVE "DANGEROUS PROBABILITY OF SUCCESS" IN ATTEMPT TO MONOPOLIZE CASES WHERE, AS HERE, THE COURT FOUND NO EVIDENCE OF ILLEGAL INTENT TO MONOPOLIZE

Petitioners ignore the fact that it was not necessary for the Court of Appeals to determine whether there was a "dangerous probability of success" in the claimed "attempt to monopolize" cases separately asserted against Shamrock and Phillips, by petitioners. Such determination was unnecessary because the Court of Appeals found there was no evidence of an illegal intent to monopolize on the part of either Phillips or Shamrock. Since "intent" to monopolize is essential in an "attempt to monopolize" case,[6] it becomes immaterial whether there was a "dangerous probability of success" because the "intent" was absent.

As to Shamrock, the Court of Appeals, in finding no intent to monopolize, stated:

> "By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act." (Opn. App. 21a).

As to Phillips and Phillips Pipeline, the Court found the evidence to show nothing more than "a proper business motive under the circumstances" and that something more must be proven "to show an intent to monopolize." (Opn. App. 18a).

[6] American Tobacco Company v. United States (1946), 328 U.S. 781; Swift & Co. v. United States (1905), 196 U.S. 375, 396; and Times-Picayune Publishing Company v. United States (1953), 345 U.S. 594, 626. See also, Lessig v. Tidewater Oil Company (9th Cir. 1964), 327 F. 2d 459, cert. den. 377 U.S. 993, the only case cited by petitioners as dispensing with proof of "dangerous probability of success" in an attempt to monopolize case wherein the court's holding was clearly predicated on proof of "specific intent" to monopolize.

Regarding both defendants, the Court said:

> "Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from established facts, we have nothing more than competition between the parties." (Opn. App. 22a, 23a).

The Court of Appeals concluded:

> "However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more." (Opn. App. 23a).

In addition to these findings of no illegal intent to monopolize the Court of Appeals found:

As to Shamrock,

> "The proof is clear that there was no dangerous probability of a monopoly." (Opn. App. 21a)

and as to Phillips,

> "Assuming *arguendo*, intent and a relevant market, a dangerous probability of success is clearly lacking." (Opn. App. 18a, 19a).

Such last quoted findings are additional reasons why no attempt to monopolize was proven if "dangerous probability" must be proved to establish "attempt to monopolize", and are merely surplusage where "dangerous probability" is not necessary to be proved because no illegal intent to monopolize was established.

The only case cited by petitioners which holds that it is not necessary to establish a dangerous probability of success in an "attempt to monopolize" case was one where there was evidence

of *specific intent* to monopolize. *Lessig v. Tidewater Oil Company,* (9th Cir. 1964), 327 F. 2d 459, cert. den. 377 U.S. 993.

The only other case cited by petitioners, *United States v. Consolidated Launderies Corporation,* (2nd Cir. 1961), 291 F. 2d 563, 573, as raising a conflict with the present case was a "conspiracy to monopolize" case, and the decision there that "dangerous probability" was not an element to be proved, was clearly limited to a situation where evidence of a conspiracy with *specific intent* to monopolize was present. Thus the issue of whether "dangerous probability of success" is required to be proved in an "attempt to monopolize" case is not presented here.

The Court of Appeals, after viewing the evidence in a light most favorable to petitioners, found, as to the respondents, that the evidence showed no more than a motive to protect their position in the market area, and that the evidence failed to reflect any predatory act or illegal act in pursuance of this motive (Opn. App. 18a, 19a, 21a, 22a, 23a).

The holding of the Court of Appeals that there was "no dangerous probability of success" as to each of the defendants rather than raising an issue of a conflict of decisions with other courts, strengthens the conclusion that no evidence of specific intent to monopolize was present. See *Lessig v. Tidewater Oil Company, supra,* at page 474, where the court, referring to dangerous probability of success, said:

> "Of course, such a probability may be relevant circumstantial evidence of intent * * *."

Under the circumstances here presented and the specific finding of no intent to monopolize, there is, in fact, no conflict be-

tween the opinion of the Court of Appeals herein and other Courts of Appeal.

Petitioners' claim of conflict between the opinion herein and other Courts of Appeal on "dangerous probability" is ill-founded and does not present a reason for granting certiorari herein.

III.

THE DECISIONS BELOW DID NOT RAISE AN ISSUE REGARDING INTERCORPORATE CONSPIRACIES

Petitioners' in their third question assert claims of conspiracy between respondent Shamrock and its subsidiary, Shamrock Pipe Line Corporation, and between Phillips and its subsidiary, Phillips Pine Line Company. These claims are predicated on the assumption that the subsidiaries' pipeline extensions were uneconomic. The Court of Appeals, however, found that there was no evidence that any pipelines were uneconomic. Thus petitioners' third ground for certiorari is without merit because it assumes a fact situation (uneconomic extension of gathering lines by the subsidiary pipeline companies) found not to exist, by the Court of Appeals.

With regard to Phillips, the court said:

> "There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn" (Opn. App. 18a).

With regard to Shamrock, which is referred to under petitioners' Ground III only in a footnote, the record is likewise devoid of evidence that its pipeline extensions were uneconomic. Rather, it is apparent from the evidence that the extensions were

made in the normal course of business. As stated by the Court of Appeals:

> "There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex." (Opn. App. 20a).

Petitioners do not point to any evidence showing Shamrock's pipeline was uneconomic but would have this court hold that a parent corporation and its wholly-owned subsidiary corporation cannot "agree" to do the very acts that they have been organized to do, though the acts are lawful and in pursuance of a lawful motive.

The Court of Appeals, after reviewing the voluminous record could find "* * * no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position." (Opn. App. 21a). Instead, the Court found that the evidence showed with regard to Shamrock:

> "It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act." (Opn. App. 21a).

Thus the record does not raise the question presented, rather, petitioners are again seeking a third review of the evidence where two lower courts have both failed to find support for their claims after such reviews.

Hence it is submited petitioners' Ground III does not present any reason or ground for this court granting certiorari.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

W. E. NOTESTINE,
P. O. Box 631,
Amarillo, Texas 79105,

H. A. BERRY,
A. W. SORELLE III,
*W. M. SUTTON,
P. O. Box 9158,
Amarillo, Texas 79105,

Attorneys for Diamond Shamrock Corporation.

Of Counsel:

UNDERWOOD, WILSON, SUTTON, HEARE & BERRY
P. O. Box 9158
Amarillo, Texas 79105

* Counsel upon whom service is to be made.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1335

PANOTEX PIPE LINE COMPANY, ET AL,
Plaintiffs-Appellants,

versus

PHILLIPS PETROLEUM COMPANY and
DIAMOND SHAMROCK CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(February 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal arises out of antitrust litigation. The district court directed verdicts for the defendants. We affirm.

Cameron and its pipeline subsidiary, Panotex, claimed damages jointly and severally against Phillips

and Shamrock, alleging a conspiracy between them, and also a conspiracy between each of them and their respective subsidiaries, Phillips Pipe Line Company and Shamrock Pipe Line Corporation. The gist of the complaint was a conspiracy, as stated, to restrain and monopolize, and to attempt to monopolize interstate commerce in the purchase and transportation of crude oil in designated areas in violation of §§ 1 and 2 of the Sherman Act. 15 USCA, §§ 1 and 2. The cause of action also alleged individual conduct on the part of Phillips and Shamrock in violation of the same statutes. The prayer was for damages and injunctive relief under §§ 4 and 16 of the Clayton Act. 15 USCA, §§ 15 and 26. The complaint and the evidence introduced in support thereof bottoms out as a claim that defendants attempted to foreclose a competitor, and having failed in that, to thereafter restrict the competitor.

The cause was tried to a jury. Motions for directed verdicts filed by Phillips and Shamrock were denied by the district court at the close of plaintiffs' case. Defendant Phillips then proceeded to put on its defense. Shamrock put in a part of its evidence through cross-examination of witnesses for Phillips. After two days of defense evidence, the court suggested, sua sponte, that Shamrock again move for a directed verdict. Shamrock so moved and the motion was granted. Phillips then asked for the same relief and its motion was granted. Counterclaims against Cameron and Panotex were severed and are not a part of this appeal.

There are three assignments of error. First, plaintiffs urge that it was prejudicial procedural error to

grant motions for directed verdicts in the middle of defendants' cases, i.e., at a random time during the trial. The contention is that a directed verdict may be granted under Rule 50, F.R.Civ.P., only after the opening statement of opposing counsel, at the close of the evidence offered by an opponent, or at the close of all of the evidence, citing 5A Moore's Federal Practice, par. 50.04. Plaintiffs also assign error on a substantive basis in the granting of directed verdicts, urging that the evidence was sufficient to make a jury question. Lastly, error is asserted on the basis of the exclusion of certain items of evidence offered by plaintiffs.

The facts will be detailed in connection with the discussion of the alleged substantive error in directing verdicts for defendants. We proceed first to a discussion of the claimed procedural error.

I.

The motions for directed verdict were granted during the presentation of the defense testimony. There was extensive colloquy between the court and counsel. The posture of the case at the time was somewhat complex in that the counterclaims of each defendant based on alleged antitrust violations by plaintiffs were being tried to the same jury. Plaintiffs' proof was voluminous and the court indicated that it had reviewed all of the testimony to date and was inclined to reconsider the motion of Shamrock for a directed verdict, and also to sever Shamrock's counterclaim. (This was the previously overruled motion for directed verdict.)

The court then ruled as indicated for Shamrock. At that point, plaintiffs joined with Phillips in moving for a mistrial because of the hiatus and confusion left in the proof as to liability and damages due to the removal of Shamrock. Phillips had moved for a directed verdict following the grant of Shamrock's motion but this motion was overruled. Following the joint motion for mistrial, the court reconsidered and granted Phillips' motion for directed verdict and also severed its counterclaim.

At no time during the proceeding did plaintiffs offer any objection whatever to the timing of the directed verdicts. Moreover, nothing was said during the proceeding which pointed to any prejudice to plaintiffs from the standpoint of timing.

There was a hearing on the form of the final judgment about a month later. At this hearing, plaintiffs took the position for the first time that they were prejudiced by the timing of the grant of the motions in that they had previously reserved the right to redirect examination of certain witnesses. The record does not reflect this reservation. The court, in fact, required plaintiffs to complete their case prior to closing.

At the same hearing, plaintiffs urged the court to make it clear in the final judgment that the motions for directed verdicts were granted on the state of the record at the time the motions were granted. The court and all counsel agreed that this was the case and the judgment so provides. Having this in mind, plaintiffs take a different position here with respect to prejudice.

They no longer urge the reservation of the right to redirect examination of the witnesses. They now contend that the court granted them the right to rebut evidence put in by Phillips in two instances. This evidence, produced from the files of Shell Oil Company, consisted of commitments to Cameron from oil producers to sell crude oil for transportation by Panotex. The pipeline of Panotex connected with that of Shell and all Cameron sales were to Shell. The other evidence was the record of oil deliveries from Cameron to Shell via Panotex. We are unable to perceive the need to rebut this evidence. We are not told how it could be rebutted, nor how it was in anyway prejudicial. We find no prejudice to plaintiffs in these events.

We do not reach the question whether Rule 50, F.R. Civ. P.,[1] prohibits the granting of a motion for directed

---

[1]Rule 50:

"(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

"(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . ."

verdict during the presentation of a defendant's case. The rule contains no such restriction nor have we found any authority supporting such a restriction. Indeed, we have found no case in point one way or the other. The Supreme Court long ago pointed to the salutary purpose of a motion for directed verdict. In *Merchants' National Bank of Boston v. The State National Bank of Boston*, 1871, 77 U.S. 604, 19 L.Ed. 1008, it was said with reference thereto:

> "According to the settled practice in the courts of the United States, it was proper to give the instruction if it were clear the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court." 77 U.S. at 637

In the end, the question of directing a verdict for a defendant during the defendant's presentation is one of orderly procedure in the frame of reference of trial court discretion, procedural due process, and a fair trial. Here there is nothing of record to support any denigration of procedural due process or the essence of a fair trial. Thus we find no error as claimed.

From the view that plaintiffs must show prejudice, the situation is analogous to federal criminal procedure where the court commits error by reserving a ruling on a defendant's motion to acquit. The error is harmless absent a showing that the evidence was insufficient to sustain a conviction when the government rested its case. *Cooper v. United States*, 5 Cir., 1963, 321 F.2d 274, 277; *Montoya v. United States*, 5 Cir., 1968, 402 F.2d 847, 849-50; *United States v. Day*, 5 Cir., 1971, 438 F.2d 121, 122.

As Justice Field stated for the court in *Oscanyan v. Winchester Repeating Arms Company*, 1881, 103 U.S. 261, 26 L.Ed. 539, in a case where a verdict was directed following the opening statement of counsel:

> "... if in the progress of a trial, either by such admission [of counsel] or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion or that of counsel, act upon it and close the case." 103 U.S. at 263

II.

Before considering the merits of the action of the district court in granting the motions for directed verdict, it will be necessary to resolve the question presented with respect to the exclusion of certain evidence offered by plaintiffs. This question involves three separate items.

The first item is an inter-corporate letter from one Phillips employee to another, dated November 11, 1960, setting out the general situation in the industry as to oil reserves in the general geographical area pertinent to this suit. The letter mentions the prospect of raiding Shamrock's customers to increase Phillips' crude oil supply. The crude oil reserves and acquisition prospects of many oil companies in the area are also discussed. The position of plaintiffs is that this letter was admissible to show motive for later concerted action between Phillips and Shamrock. The district court excluded it on the ground that it originated prior to the period of activities giving rise to the suit.

We hold that this letter was admissible, and was to be given such weight as it might deserve in light of the proof, if any, as to any future concerted action between Phillips and Shamrock. Cf. *Federal Trade Commission v. Cement Institute*, 1948, 333 U.S. 683, 705, 68 S.Ct. 793, 92 L.Ed. 1010. Accordingly, it will be considered here in determining whether verdicts should have been directed.

The next item was a contract showing that Shamrock purchased casinghead gas from oil producers. Plaintiffs, not having a refinery, purchased only crude oil and condensate. The argument is that Shamrock used casinghead gas purchases as a lever to obtain contracts for the purchase of crude oil and condensate; hence, an illegal tying arrangement. The district court excluded this evidence on the ground that it was irrelevant to the pleadings.

Ordinarily this evidence would have been admissible to show the vehicle for an illegal tying arrangement as a part of an attempt to monopolize or restrain trade on the part of Shamrock. The admission would be subject, however, to the introduction of some evidence of a tying arrangment. There was no proffer of evidence to show such a tying arrangement at the time this evidence was excluded nor at any other time. Thus the error was in the abstract and harmless.

The third item of evidence is a group of letters and memoranda having to do with the effort of Cameron to obtain a loan from the First National City Bank of Houston, Texas, with which to finance their proposed pipeline. The fact of attempting to obtain this loan was stipulated. There was also full testimony regarding the effort. Plaintiffs wished to put in such portions of the letters and memoranda as would reflect Phillips' alleged antagonism to the proposed pipeline and as would provide a basis for an inference that the loan was not made because of Phillips' influence over the bank. The district court excluded this evidence on grounds that the documents contained hearsay, as well as self serving opinions and conclusions on the part of a Cameron agent. With these objectionable portions removed from the documents, the court was of the opinion that nothing of coherent value would remain to be considered by the jury.

This evidence consisted of twelve letters and three memoranda prepared by Cameron's agent and one letter from an officer of the Houston bank regarding Cameron's application for the loan. The court properly

refused to admit the conclusions and opinions of Cameron's agent which were contained in the letters and memoranda. They were not admissible under the Business Records Act, 28 USCA, § 1732(a); *Standard Oil Company of California v. Moore*, 9 Cir., 1957, 251 F.2d 188, 213-14. No effort was made by plaintiffs to introduce the documents with the conclusions and opinions deleted and thus we need not consider whether the remaining documents or parts thereof qualified as an exception to the hearsay rule under the Business Records Act. The court did not err in excluding this evidence.

There is one other item of excluded evidence concerning which plaintiffs assign error but it goes to the question of damages. As will be seen, we do not reach the question of damages and thus it is unnecessary to consider this assignment of error.

III.

We now turn to question whether the court erred in directing verdicts for defendants or either of them. The test to be applied is the now familiar one of *Boeing Company v. Shipman*, 5 Cir., 1969, 411 F.2d 365 (en banc), where we said:

> "On motions for directed verdict ... the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and infer-

ences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury." 411 F.2d at 374.

Phillips and Shamrock were integrated oil companies in that they owned and operated refineries in the geographical area with which we are concerned. They transported their own production as well as the production of others to their refineries. The transportation was by their subsidiary pipeline companies. Cameron had no production but purchased from others for transportation over Panotex, its subsidiary, to Shell's pipeline.

It is a fact also that a pipeline tends to be a natural monopoly. Plaintiffs offered testimony to the effect that the first pipeline into an area customarily gets the connections that are available in the oil fields. If two lines enter at about the same time, they are likely to divide the available production. In addition, a trucking operation is not competitive with a pipeline.

As the Supreme Court has noted, *Federal Trade Commission v. Cement Institute*, supra; *Standard Oil Co. v. United States*, 1911, 221 U.S. 1, 46, 31 S.Ct. 502,

55 L.Ed. 619, evidence as to events prior to and following alleged antitrust activity is admissible if it tends to show the purpose and character of particular transactions under investigation. Thus it is that the charges against defendants must be viewed in the background of the facts as they existed prior to entry of Cameron and Panotex into the pipeline market; indeed prior to the creation and construction of Panotex.

Background and Relevant Markets

The controversy involves competition between three pipelines, Phillips, Shamrock and Panotex, in the general area of the Texas-Oklahoma border. Oil situated in two counties in Oklahoma is involved: Beaver and Texas Counties. These counties border on the north boundary of the State of Texas. Oil situated in ten Texas counties lying immediately south of these Oklahoma counties is also involved. The counties are Hansford, Ochiltree, Lipscomb, Moore, Hutchinson, Roberts, Hemphill, Carson, Gray and Wheeler.[2]

Phillips' refinery is in Hutchinson County. Shamrock's refinery is in Moore County. As of 1954, the crude oil for these refineries was supplied out of the Texas panhandle oil field, in Moore, Hutchinson, Roberts, Carson, Gray and Wheeler Counties. The reserves in this field were becoming inadequate to meet the needs of the refineries. New fields were being developed in the counties to the north and east. By 1957, Shamrock

[2]See Appendix A attached for a map of the general area and the pipelines pertinent to this litigation.

had extended its pipeline north into fields located in Hansford and Ochiltree Counties. Phillips remained in the panhandle.[3]

By 1961, Phillips had extended its pipeline through the southeast corner of Hansford County to connect one field, and on through Ochiltree County to connect with several fields and into Texas and Beaver Counties in Oklahoma (the Camrick area) to connect with fields there. Its pipeline crossed that of Shamrock in Ochiltree County.

In 1961, Cameron was engaged in purchasing crude oil in the Camrick area of Texas and Beaver Counties and transporting it by truck for resale. The Phillips pipeline extension into the Camrick area brought about a considerable reduction in Cameron's trucking business but that reduction is not a basis of the claim here.

In 1963, Mobil Oil, a company not involved in the controversy here, extended its pipeline into the Camrick area from the north.

The area to the east of these lines, in Texas and Oklahoma was undeveloped. Thereafter, beginning in 1963, fields were developed in this eastern area, in Beaver County, Oklahoma, and in Lipscomb County and in the north part of Hemphill County, in Texas.

By August 1963, Shamrock had extended its pipeline eastward into this new area in Lipscomb County to

---

[3]By 1968, Shamrock had extended its line to southern Colorado to obtain oil for its refinery.

connect with the Frass and W. Follett fields. This was pre-Panotex.

During this year of 1963 the Panotex pipeline was conceived by Cameron and commitments from producers were being obtained. Primary equity financing was obtained in late 1963 from Alliance Business Investment Company. In February 1964 a loan was sought from the Houston bank. This effort was unsuccessful and financing was sought and obtained in New York in July 1964. Panotex came into corporate existence in July 1964, its line was commenced in October 1964 and became operative in January 1965.

Meanwhile, as Cameron's president discovered in 1963, Phillips was soliciting commitments from purchasers in 1962 in the Oklahoma part of the Texas-Oklahoma area where Cameron began solicitations in 1963. These solicitations were for production as far east as the Logan area in Beaver County, Oklahoma. Phillips had considerable production of its own in the Como area and was trucking six to seven thousand barrels of oil per day from there to Camrick. This oil amounted to approximately ten per cent of the capacity of Phillips' refinery.

Cameron testified that he began looking at this area after his Camrick trucking operation declined in 1961. His idea was that new pools of oil would be developed in this eastward territory in Beaver and Lipscomb Counties and this proved to be the case in the next few years.

This brings us to the relevant markets. Plaintiffs tried the case on the theory of three relevant markets. We will consider the case on that basis and without determining the correctness of the delineation.

Area I, according to plaintiffs' theory of suit, is the Camrick area, heretofore described. It was served by Phillips' pipeline beginning in 1961 and by Mobil beginning in 1963. Panotex has never entered this market.

Area II is south Beaver County and mainly the Balko, Elmwood and Como fields in that county. Phillips extended its pipeline east through the Balko and Elmwood fields and to Como in September 1964. Panotex constructed its line westward through these fields in January 1965. Prior to these extensions, Cameron and Phillips were advised of what the other proposed to do.

Shamrock served neither Area I or II by pipeline. Phillips does not serve Area III. Area III consists of the Logan field in Beaver County, Oklahoma and all of Lipscomb County, and the Feldman field in Hemphill County, Texas. It is served by Shamrock and Panotex. The Panotex line began at the Shell pipeline at Elk City in Beckham County, Oklahoma, considerably southeast of the areas in question, and thence extended in a northwesterly direction into fields in Lipscomb and Hemphill Counties, Texas, namely the Feldman, West Higgins, Kelln and Mathers field. It is to be noted that Panotex had a monopoly in these fields until 1968 when Shamrock entered Kelln and West Higgins. The Cranford, Bishop and West Durham fields had

been developed along the line of Panotex by 1968 and were served exclusively by Panotex.

The line of Panotex continued northwesterly to reach the Lipscomb and Bechthold fields in Lipscomb County, Texas, and the Loan field in Beaver County, Oklahoma. It appears that Shamrock reached the Lipscomb field in August 1963 and extended to the Logan and Bechthold fields in August 1964. Shamrock, prior to its extension and the entry of Panotex, had been purchasing oil from the Logan area from a trucker who served the area.

The Case Against Phillips and its Subsidiary

The issue presented is the foreclosing or restriction of a competitor, Cameron-Panotex. The claim is premised on conduct of Phillips, acting alone or in league with its pipeline subsidiary or with Shamrock.

We begin by eliminating Area I. Panotex is not in Area I. Phillips has been there since 1961. Cameron-Panotex makes no case whatever from a factual standpoint on being foreclosed from or restrained in Area I, either through an attempted monopoly or by way of a restraint. The facts at best show only that Area I had no pipeline service until 1961 when Phillips entered. There is no evidence that Cameron-Panotex ever considered entering Area I after the entry of Phillips. The evidence demonstrates no more than a normal business venture on the part of Phillips in entering Area I (Camrick). The issue narrows to Areas II and III.

Area II consists of only three fields, Balko, Elmwood and Como. They are served by Phillips and Cameron-Panotex. Phillips extended east from Area I in September 1964 and Panotex commenced service in January 1965. Phillips had solicited commitments in Area II in 1962 according to Cameron. It was trucking oil out of the area and had production of its own on 16,000 acres of leases in the Como area. Phillips also solicited in the Logan field in Area III. Cameron began solicitations in the area in 1963. There was no previous pipeline service to Area II. Phillips had little success in obtaining commitments.

The evidence disclosed that plaintiffs were purchasing 100 per cent of the Balko production, most of the Elmwood production, fifty per cent of the Como production (Phillips had some production), and all of the Logan production except for one producer. This was the situation immediately upon the completion of the Panotex line and plaintiffs obtained all of the oil that was committed to them. In the ensuing years, Panotex has obtained all new production in Area II and at Logan. Phillips has not connected to a new lease since 1964.

When Cameron announced in 1964 that it had received financing, Phillips met Cameron's price and contract terms. Its prior offers had been higher and its contract terms more stringent. In addition, Phillips agreed with its pipeline subsidiary to guarantee it a seven per cent return on investment as a condition of a pipeline extension into Area II. The commitments of Phillips, according to plaintiffs, were insufficient

to produce such a return. It does appear that the commitments were less than the number theretofore insisted upon by the Phillips pipeline subsidiary. There is no proof, however, that the extension was unprofitable and thus something from which an inference of predatory conduct could be drawn. In meeting the Panotex competition, Phillips took three simultaneous steps: (1) it met Cameron's price offer; (2) it met Cameron's contract requirements as to period of contract; (3) it guaranteed its pipeline subsidiary a seven per cent return so as to replace its trucking operation with a pipeline. The proof stops here. It goes no further than to show that Phillips needed the oil for its refinery and would be preempted by the entry and consequent monopoly of another pipeline. It is true that the evidence shows that Phillips considered Area II as "its own backyard" and sought to protect its position in the area. This, however, amounts to nothing more than a proper business motive under the circumstances. Cf. *Times-Picayune Publishing Company v. United States*, 1953, 345 U.S. 594, 627, 73 S.Ct. 872, 97 L.Ed. 1277, on the necessity to prove something more than a "step predominantly motivated by legitimate business aims ..." to show an intent to monopolize.

At this point we find that the evidence of a conspiracy between Phillips and its pipeline subsidiary is nonexistent from the point of showing a violation of §§ 1 or 2 of the Sherman Act.

This is likewise true as to showing an attempt to monopolize on the part of Phillips. Assuming *arguendo*, intent and a relevant market, a dangerous probability

of success is clearly lacking. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 5 Cir., 1969, 417 F.2d 203, 206-08.

The action of Phillips in extending into Area II did not rise above a protective motive. Phillips was already present through a trucking operation and through its own production. Panotex was transporting in another direction and away from Phillips' refinery. Protection of its refinery by the assurance of some of the oil reserves in Area II was no more than a normal business practice absent conduct calculated to bar the entry of a competitor into Area II or to drive a competitor out of the area. The proof disclosed no such conduct on the part of Phillips. There was no proof of predatory conduct or of conduct which was illegal per se. It follows that the proof was insufficient to make a jury question as to a restraint of trade by Phillips from the conduct disclosed to this point.

Plaintiffs urge that Phillips violated the Sherman Act by allegedly blocking Cameron's application for a loan from the Houston bank with which to construct Panotex. The Chairman of Phillips happened to be a director of the bank. Phillips had been a long time large depositor in the bank. The other side of the coin is that the loan was never formally rejected although some five months of negotiations took place. The bank was troubled by the probability of success of the venture, considering competitive pipelines in the proposed Panotex area and the status of Cameron's commitments. There is no evidence that Phillips influenced by word or deed the decision not to make the loan. There the matter ends. A Phillips officer on the bank

board and a Phillips deposit in the bank will not suffice as a base for an inference of loan influence and in turn, for an inference of an antitrust violation. The bank sent a consultant to discuss the prospects of Panotex with Phillips and Phillips advised that it intended to compete for the oil. This was a business judgment in line with the needs of its refinery. Phillips was not willing to give up the area where it competed to Panotex.

There is one other charge against Phillips and it stems from an alleged division of markets as between Shamrock and Phillips. This will be considered following the discussion of the case against Shamrock.

The Case Against Shamrock and Its Subsidiary

There is no evidence that Shamrock conspired with its pipeline to restrain trade or to monopolize. The competing lines were simply built either prior to the entry of Panotex or after the entry of Panotex. The subsidiary pipeline did no more than build lines, set prices and make purchases. Shamrock's prices were uniform throughout the Shamrock system except in one instance. This one instance occurred for a short time in the Logan and Bechthold fields. Shamrock first attempted to pay producers a price less than that paid by Cameron. When Cameron obtained commitments from eighty per cent of the producers, Shamrock raised its net offer to the producers. After this price increase, Shamrock's price, while exceeding that of Cameron by two cents per barrel, was uniform with its prices throughout the remainder of its system.

Moreover, Cameron had contracts with its producers to hold them providing it met the prices of others.

The competition between Panotex and Shamrock was all in Area III. By and large, as stated, Shamrock was in this area prior to the entry of Panotex and, like Phillips, was seeking oil for its refinery. There is no evidence that the conduct of Shamrock or its subsidiary exceeded a protective position. It competed with Panotex for oil but without predatory action. It engaged in no conduct which can be described as illegal per se under the Sherman Act. The proof is clear that there was no dangerous probability of a monopoly.

We conclude that the evidence was insufficient to make jury issues on the charges against Shamrock to this point.

The Alleged Phillips-Shamrock Conspiracy

The proof was that Phillips and Shamrock had been competing in the general area involved for more than 40 years. There was evidence as to specific examples of competition between them. Plaintiffs' case, however, comes down to evidence of a elephone conversation between Phillips and Shamrock, made to Phillips by Shamrock in 1964, wherein Shamrock inquired whether Phillips had any interest in extending into the Logan area. Phillips answered that it did. Shamrock replied that it too would also have to go into Logan and that "it won't be the first time we have been competitors."

Plaintiffs make much of the fact that Shamrock extended to Logan and Phillips did not. Phillips went no further east than the Como field in Area II while Shamrock went no further west than Logan. Standing alone, this might give rise to an inference of a division of markets between Phillips and Shamrock to the detriment of their mutual competitor, Panotex. But this evidence does not stand alone.

Phillips had been seeking commitments in the Logan area without success. Panotex had every producer in the field except one. Shamrock acquired that one. The interest of Phillips was such that it staked a right of way into Logan but abandoned the prospect for lack of business.

Phillips had production of its own in the Como field and some additional suppliers. These facts gave good reason for Phillips to stop at Como and for Shamrock to stop at Logan. They established a basis for a business judgment resting on the idea that a certain amount of production was necessary to warrant the expense of extending the pipelines. Any inference of a division of markets must give way to these facts.

This case began in 1964. It has been strenuously developed through discovery and otherwise. It occupied more than two weeks of trial time. In the end there is no substance to plaintiffs' claims. Under the test of viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of all inferences which might reasonably be drawn from estab-

lished facts, we have nothing more than competition between the parties.

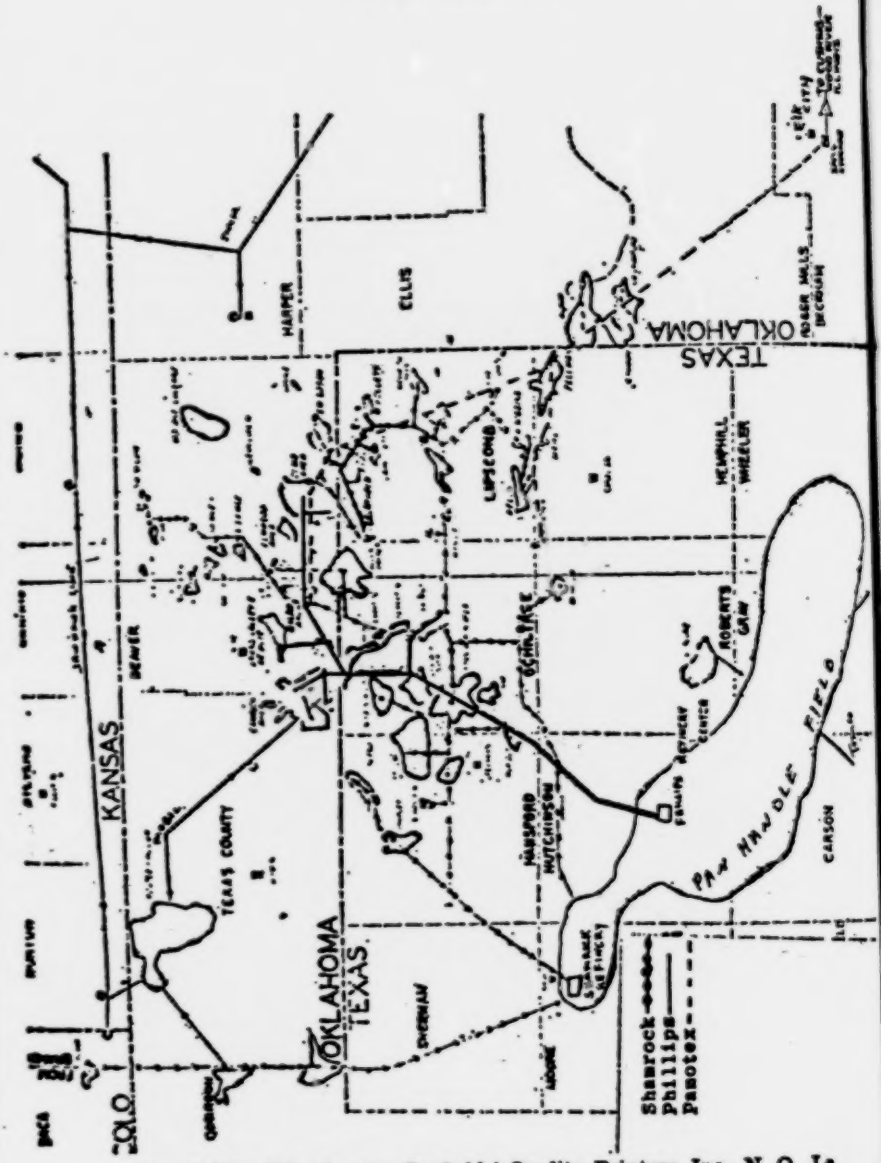
It seems implicit in plaintiffs' position that they view the law as protecting them from competition, whether from those already in the market or from newcomers to the market. This is not the law, and the fact that a pipeline can be a natural monopoly does not mean that it is protected from competition. The Sherman Act fosters competition by protecting it from illegal restraints and monopoly power. *Northern Pacific Railway Company v. United States*, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed. 2d 545. Plaintiffs, of course, are protected to this extent. However, after having considered all of the evidence and every contention made by plaintiffs, we find no evidence of an illegal restraint or of a proscribed attempt to monopolize on the part of defendants, individually or collectively. The record is one of allowable competition — nothing more.

We hold that the district court did not err in directing verdicts for Phillips and Shamrock.

AFFIRMED.

PANOTEX v. PHILLIPS PETROLEUM CO.

APPENDIX "A"



Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.